

ICWA and Child in Need of Care Practice in Kansas

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Navigating child in need of care (“CINC”) proceedings can be challenging under the best of circumstances. Those challenges may be magnified when an Indian child is involved, especially where none of the participants are familiar with the unique legal framework governing such proceedings. These materials provide a starting point for understanding this framework. Part I discussed considerations under Kansas law, including relevant provisions of the Revised Kansas Code for Care of Children, K.S.A. § 38-2201 *et seq* (the “Kansas Code”). Part II provides an overview of the federal Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq*. (“ICWA”). Part III contains a list of additional resources.

I. Kansas Law

The Kansas Code provides that “[p]roceedings concerning any child who may be a child in need of care shall be governed by this code, *except in those instances when the court knows or has reason to know that an Indian child is involved, in which case, the [ICWA] applies.*” K.S.A. § 38-2203. That section goes on to make clear that ICWA may apply to the following matters:

- the filing to initiate CINC proceedings (K.S.A. § 38-2234);
- ex parte custody orders (K.S.A. § 38-2242);
- temporary custody hearings (K.S.A. § 38-2243);
- adjudications (K.S.A. § 38-2247);
- burden of proof (K.S.A. § 38-2250);
- dispositions (K.S.A. § 38-2255);
- permanency hearings (K.S.A. § 38-2264);
- termination of parental rights (K.S.A. §§ 38-2267, 38-2268, and 38-2269);
- establishment of permanent custodianship (K.S.A. §§ 38-2268 and 38-2272);
- placement of a child in any foster, pre-adoptive or adoptive home; and
- placement of a child in a guardianship arrangement under the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. § 59-3050 *et seq.*).

Id.

The Kansas Code contains several other specific provisions which apply where an Indian child is involved:

- An Indian tribe seeking to intervene but not yet a party to CINC proceedings enjoys status as an “interested party” K.S.A. § 38-2202(m) (see also K.S.A. §38-2241(e)(2)).
- An Indian tribe that intervenes in CINC proceedings pursuant to ICWA is granted full status as a “party.” K.S.A. §38-2202(v).
- Indian tribal organizations authorized to receive and investigate reports of a child known or suspected to be in need of care (such as a tribal social services department) are included in the list of entities authorized to participate in the free exchange of information regarding children who are alleged or who have been adjudicated to be in need of care. K.S.A. § 38-2210(f).
- An Indian tribe that is a party to a CINC proceeding may designate persons other than an attorney (such as a tribal social services employee) to have access to the child’s social file. K.S.A. § 38-2211(b).

In addition to Kansas statutory provisions, the role of the guardian *ad litem* in CINC proceedings involving Indian children should not be overlooked. Guardians *ad litem* are typically appointed pursuant to the form Order Appointing Guardian *Ad Litem* included with Kansas Supreme Court Administrative Order No. 100 (“Order No. 100”). The form order provides that “[t]he guardian *ad litem* shall comply with all the guidelines of [Order No. 100].” Of particular importance in CINC proceedings involving Indian children, Order No. 100 provides that a guardian *ad litem* should “[d]etermine the best interests of the child by considering such factors as the child’s...culture and ethnicity.”

II. The Indian Child Welfare Act

ICWA is codified at 25 U.S.C. §§ 1901-1963. The introductory provisions contain congressional findings and statement of policy as well as definitions. Subchapter I contains the provisions impacting child custody proceedings, including CINC proceedings. Other subchapters address Indian child and family programs, recordkeeping, information availability, timetables, and other miscellaneous provisions.

Congressional Findings

When it passed ICWA, Congress made it clear that it was exercising its plenary powers over Indian affairs pursuant to the Indian Commerce Clause. 25 U.S.C. § 1901(1) (citing U.S. Const. Art. I, Sec. 8, Clause 3). Congress also made the following findings:

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and

private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

25 U.S.C. § 1901(3)-(5).

Policy Declaration

Congress then made the following policy declaration:

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

25 U.S.C. § 1902.

Definitions

ICWA includes definitions for “child custody proceeding” (including embedded definitions for “foster care placement,” “termination of parental rights,” “preadoptive placement,” and “adoptive placement”), “extended family member,” “Indian,” “Indian child,” “Indian child’s tribe,” “Indian custodian,” “Indian organization,” “Indian tribe,” “parent,” “reservation,” “Secretary,” and “tribal court.”

Because the application of ICWA and its requirements are triggered by the presence of an “Indian child,” it is particularly important to understand the definition of that term. An “Indian child” is any unmarried person under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. 25 U.S.C. § 1903 (4). An “Indian tribe” means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of Interior because of their status as Indians, including certain Alaska Native villages. 25 U.S.C. § 1903(8). An “Indian” is any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in 43 U.S.C. § 1606 (often referred to as an Alaska Native Corporation). 25 U.S. 1903(3).

Jurisdiction and Intervention

An Indian tribe has jurisdiction exclusive to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. 25 U.S.C. §1911(a). Further, where an Indian child is a ward of a tribal court, the Indian tribe retains exclusive jurisdiction notwithstanding the residence or domicile of the Indian child. *Id.* Jurisdiction pursuant to this subsection is subject to State action for emergency removal of an Indian child residing or domiciled on a reservation but temporarily located off the reservation in order to prevent imminent physical damage or harm to the child. 25 U.S.C. § 1922.

In State court proceedings for foster care placement or termination of parental rights involving an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court "shall transfer such proceeding to the jurisdiction of the tribe...upon the petition of either parent or the Indian custodian or the Indian child's tribe." 25 U.S.C. § 1911(b). The State court is not obligated to transfer jurisdiction if it finds good cause to the contrary. *Id.* Additionally, the State court has no obligation to transfer jurisdiction if either parent objects to such transfer. *Id.* Finally, the tribal court is free to decline the transfer of jurisdiction. *Id.*

Both the Indian custodian of an Indian child and the Indian child's tribe have the right to intervene at any point in any State court proceeding for foster care placement or, or termination of parental rights to, an Indian child. 25 U.S.C. § 1911(c).

Procedural Matters

Where the court knows or has reason to know that an Indian child is involved in an involuntary proceeding in State court, the party seeking foster care placement of, or termination of parental rights to, an Indian child is required to notify the parent or Indian custodian and the Indian child's tribe of the pending proceedings and of their right of intervention. 25 U.S.C. § 1912(a). This notice must be provided by registered mail with return receipt requested. *Id.* If the identity or location of the parent, Indian custodian and the Indian child's tribe cannot be determined, such notice must be provided to the Secretary of the Interior in like manner. *Id.* The Secretary then has 15 days to provide the requisite notice. *Id.* Importantly, no foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of such notice by the parent or Indian custodian and Indian child's tribe or the Secretary. *Id.* Upon request, the court is required to grant the parent or Indian custodian or tribe an additional twenty days to prepare for such proceedings. *Id.*

In any removal, placement or termination proceeding, the parent or Indian custodian has the right to court-appointed counsel upon a determination of indigency by the court. 25 U.S.C. § 1912(b). Each party to a foster care placement or termination of parental rights proceeding under State law involving an Indian child has the right to examine all reports or other documents filed with the court upon which any decision may be based. 25 U.S.C. § 1912(c). Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under

State law is required to satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 U.S.C. § 1912(d).

Both foster care placements and terminations of parental rights require evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C. §1912(e), (f). Foster care placement proceedings have a clear and convincing evidentiary standard. 25 U.S.C. § 1912(e). Terminations of parental rights may only be ordered upon evidence beyond a reasonable doubt. 25 U.S.C. § 1912(f).

Parental Rights; Voluntary Termination; Invalidation of Certain Actions

The voluntary consent of a parent or Indian custodian to a foster care placement or termination of parental rights is not valid unless executed in writing, recorded before a judge of a court of competent jurisdiction, and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. 25 U.S.C. § 1913(a). The court certification must also confirm that the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language understood by the parent or Indian custodian. *Id.* No consent given prior to, or within 10 days following, the birth of the Indian child is valid. *Id.*

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian. 25 U.S.C. § 1913(b). Similarly, in any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption and the child shall be returned to the parent. 25 U.S.C. §1913(c). A parent may even withdraw consent and petition the court to vacate a final decree of adoption where the parent's consent was obtained through fraud or duress. 25 U.S.C. §1913(d).

An Indian child who is the subject of an action for foster care placement or termination of parental rights under State law, a parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated sections 1911, 1912, and 1913 of Title 25. 25 U.S.C. § 1914.

Placement of Indian Children

Placement preferences for foster care, adoptive and preadoptive placements are set forth in 25 U.S.C. § 1915. In the absence of good cause to the contrary, preference shall be given to an adoptive placement under State law with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families. 25 U.S.C. § 1915(a).

Foster care or preadoptive placements must be made in a manner so that the Indian child is placed in the least restrictive setting which most approximates a family and in which the Indian child's special needs, if any, may be met. 25 U.S.C. 1915(b). In addition, such placements must be made in a manner in which the Indian child is placed within reasonable proximity to his or her home, taking into account any special needs of the child. *Id.* With these considerations in mind, a foster care or preadoptive placement of an Indian child must, in the absence of good cause to the contrary, be made with (1) a member of the Indian child's extended family; (2) a foster home licensed, approved or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. *Id.*

The ICWA foster care, preadoptive and adoptive placement preferences discussed above are trumped by different preferences established by resolution of the Indian child's tribe, so long as the placement is the least restrictive setting appropriate to the particular needs of the child. 25 U.S.C. § 1915(c). Where appropriate, the preference of the Indian child or the parent shall be considered; provided that where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences. *Id.*

The standards to be applied in meeting preference requirements shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family reside or with which the parent or extended family members maintain social and cultural ties. 25 U.S.C. § 1915(d). The State is required to maintain a record of each placement, evidencing efforts to comply with the preference order required under ICWA. 25 U.S.C. § 1915(e). Such record must to be made available at any time at the request of the Secretary of the Interior or of the Indian child's tribe. *Id.*

Tribal Affiliation Information

Upon application by an Indian individual who has reached age of 18 and was the subject of an adoptive placement under State law, the court which entered the final decree must inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. 25 U.S.C. § 1917. Typically, this will include identification of the individual's biological parents.

III. Additional Resources

- Dept. of the Interior – Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (November 26, 1979);
- Native American Rights Fund website (<http://narf.org/icwa/>);
- National Indian Child Welfare Association (<http://www.nicwa.org/>);

- Dept. of the Interior – Bureau of Indian Affairs Notice – Indian Child Welfare Act; Designated Tribal Agents for Service of Notice, 79 Fed. Reg. 3225 (January 17, 2014) (<https://www.federalregister.gov/articles/2014/01/17/2014-00779/indian-child-welfare-act-designated-tribal-agents-for-service-of-notice>);
- *The Indian Child Welfare Act: Case and Analysis*, C. Steven Hager (Oklahoma Indian Legal Services, Inc. 2013) (ISBN: 978-0-9883402).